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No. 94-1756

In the Supreme Court of the United States

OCTOBER TERM, 1994

NICHOLAS FERRANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in determining petitioner's liability in a civil RICO action, the district court properly took into consideration petitioner's assertion of his Fifth Amendment privilege against compulsory self-incrimination.

2. Whether the district court correctly held that petitioner's prior guilty plea to a state offense conclusively established a predicate racketeering act for purposes of the RICO statute.

3. Whether the district court's order granting summary judgment against petitioner and awarding injunctive relief violated petitioner's rights under the Due Process Clause of the Fifth Amendment or the Excessive Fines Clause of the Eighth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unpublished, but the judgment is noted at 47 F.3d 1158 (Table). A prior opinion of the court of appeals (Pet. App. 5a-24a) is reported at 44 F.3d 1082. The opinion of the district court (Pet. App. 25a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1995. The petition for a writ of certiorari was filed on April 24, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 6, 1989, the United States filed a civil complaint in the United States District Court for the Eastern District of New York against petitioner and more than 100 other individual and corporate defendants who were involved in the solid waste disposal industry in Nassau and Suffolk Counties in New York. Pet. App. 25a; I C.A. App. A71-A202. The complaint was brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* Pet. App. 25a; I C.A. App. A75-A76. It alleged that for several decades the waste disposal industry in Nassau and Suffolk Counties had been "infiltrated, controlled, influenced, corrupted and run by organized crime," including the Lucchese and Gambino organized crime families. I C.A. App. A75. The complaint alleged that the defendants had engaged in a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), by committing illegal acts and using force and threats against other individuals engaged in the waste disposal industry in order to maintain the control of organized crime over that industry. Pet. App. 25a; see I C.A. App. A79-A82. The complaint sought, among other remedies, injunctive relief pursuant to 18 U.S.C. 1964(a).[1] I C.A. App. A199-A201

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[1] Section 1964(a) provides:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibit-

In April 1994, the government moved for summary judgment against petitioner. See I C.A. App. A228-A229. The government alleged that petitioner, who was involved in the waste disposal industry through his companies Unique Sanitation and U-Need-A-Roll-Off, worked closely with Salvatore Avellino, an official in the Lucchese organized crime family, in controlling waste collection in Nassau and Suffolk counties. Pet. App. 25a-26a; II C.A. App. A689-A691. In particular, the government alleged, petitioner acted as a principal "bagman" for Avellino and assisted Avellino in collecting extortion payments from waste disposal companies for the Lucchese crime family. Pet. App. 26a; II C.A. App. A690-A691. In support of those allegations, the government submitted the affidavit of FBI Agent Donald McCormick, along with numerous transcripts of intercepted telephone conversations. Pet. App. 36a; I C.A. App. A230-A687.

To establish the predicate acts necessary for RICO liability, the government relied in part on petitioner's 1986 New York state court guilty plea to the felony offense of coercion. Pet. App. 7a, 26a-27a. During the plea proceeding, petitioner acknowledged that he had threatened private contractors with damage to their property if they bid for waste disposal work. Pet. App. 26a-27a. In addition, the government alleged that petitioner had bribed officials at the Oyster Bay town dump in order to receive a reduction in the fees his

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ing any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

companies were required to pay for use of the town's refuse disposal services. Pet. App. 7a, 27a. In support of that allegation, the government submitted affidavits of three former Oyster Bay employees, who stated that petitioner bribed employees of the dump with the understanding that they would improperly assist him in reducing his companies' fees. Pet. App. 33a; II C.A. App. A717-A718, A730, A745-A746.

In its summary judgment motion, the government requested that petitioner be enjoined from engaging in any activities involving waste disposal, committing further violations of the RICO statute, participating in the affairs of any trade waste association or labor union, and associating with any member of organized crime for any commercial purpose. Pet. App. 37a; II C.A. App. A777. In addition, the government requested that petitioner be ordered to divest his interests in his waste disposal companies and to disgorge proceeds derived from his unlawful conduct. *Ibid.*

2. The district court granted the government's summary judgment motion. Pet. App. 25a-42a. The court found that the evidence submitted by the government showed that petitioner had engaged in illegal acts that constituted a pattern of racketeering activity. Pet. App. 30a-37a. The court held that petitioner's admission during the guilty plea proceeding that he had threatened private contractors with property damage if they did not refrain from bidding for waste disposal work "conclusively establishe[d]" that petitioner had violated the Hobbs Act, 18 U.S.C. 1951. Pet. App. 30a-33a. The court also found that the government's evidence showed that petitioner had "personally bribed officials at the Oyster Bay dump," in violation of state bribery laws. Pet. App. 33a. In

addition, the court observed that petitioner had invoked his Fifth Amendment privilege against compulsory self-incrimination when questioned about the bribes at a deposition, and it concluded that "an adverse inference may be drawn in a civil RICO proceeding against a defendant who invokes the privilege against self-incrimination."[2] Pet. App. 33a-34a.

In response to the government's motion, petitioner submitted affidavits of his son, Joseph Ferrante, and of Gary Pezza, whose father operated a waste disposal company. Pet. App. 29a-30a, 36a-37a; II C.A. App. A781-A812, A991-A993. The district court found that although Ferrante and Pezza "den[ied] knowledge of the allegations of the government and offer[ed] alternative interpretations of the events described," they failed to "assert knowledge of specific facts showing that there is a genuine issue for trial." Pet. App. 29a-30a. The court concluded that petitioner had not "shown the existence of a genuine issue of material fact as to his civil RICO liability," and that summary judgment was therefore appropriate. Pet. App. 37a.

The district court ordered the relief requested by the government. Pet. App. 37a-38a. The court observed that the court of appeals had upheld its award of similar relief against Avellino, and that "[t]he activities on which [petitioner's] RICO violations are based are * * * similar to those for which Avellino was held liable." Pet. App. 38a (citing *United States*

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[2] The court also noted that petitioner had asserted his Fifth Amendment privilege in response to questions about intercepted conversations submitted by the government in support of its characterization of petitioner as a "bagman" for Avellino. Pet. App. 36a.

v. *Private Sanitation Industry Ass'n*, 995 F.2d 375, 377 (2d Cir. 1993)).

3. Petitioner appealed the district court's order and filed a motion in the court of appeals requesting a stay of the order pending resolution of the appeal. Pet. App. 6a. The court of appeals denied the stay motion, finding that petitioner had "point[ed] to no material issue of fact to establish a substantial possibility" that the district court's order would be reversed on appeal. Pet. App. 5a-9a.

Judge Heaney of the Eighth Circuit, sitting by designation, dissented from the denial of petitioner's motion for a stay. Pet. App. 10a-24a. In Judge Heaney's view, the district court's order requiring petitioner to divest his interests in his waste disposal companies and enjoining him from engaging in any activities in connection with solid waste disposal, participating in the affairs of any labor union, and associating with members of organized crime for commercial purposes went "beyond rough compensation to serve the goals of retribution and deterrence and therefore constitute[d] punishment."[3] Pet. App. 17a-18a. Judge Heaney concluded that "the quasi-criminal nature of the remedies sought by the government * * * render summary judgment an inappropriate means by which to impose liability on [petitioner]." Pet. App. 10a. Because Judge Heaney believed that petitioner had "demonstrated a substantial possibility of success on appeal on the issue

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[3] Judge Heaney "agree[d] that disgorgement of ill-gotten gains constitutes a nonpunitive relief," Pet. App. 17a, and he acknowledged that his view that the other remedies imposed by the district court were punitive "has not been adopted by the courts of this circuit in similar cases." Pet. App. 15a.

of summary judgment's propriety in a quasi-criminal action," Pet. App. 19a, he would have imposed a "limited stay" to "preserve the status quo" pending the resolution of petitioner's appeal. Pet. App. 23a-24a.

4. The court of appeals affirmed the district court's order granting summary judgment against petitioner. Pet. App. 1a-4a. The court rejected petitioner's claim that the government failed to establish that he had committed the two racketeering acts required for liability under RICO. Pet. App. 2a-3a. The court explained that petitioner's state court guilty plea to coercion "conclusively showed that he had engaged in conduct indictable under the Hobbs Act," and that petitioner "had a full and fair opportunity to litigate in state court, and is now precluded from relitigating the facts underlying his plea." *Ibid.* In addition, the court found, the government established that petitioner had repeatedly committed the state crime of bribery, and the district court properly drew "an adverse inference from [petitioner's] failure to testify in this civil RICO proceeding, notwithstanding the fact that the [g]overnment, rather than a private party, is the plaintiff." Pet. App. 3a. Finally, the court rejected petitioner's challenge to the scope of the injunctive relief ordered by the district court, noting that it had upheld the district court's award of similar injunctive relief against Avellino. Pet. App. 4a (citing *United States* v. *Private Sanitation Industry Ass'n, supra*).

ARGUMENT

1. Petitioner renews his challenge to the district court's entry of summary judgment against him, claiming (Pet. 20-24) that the court erred in drawing

an adverse inference based on his assertion of his privilege against compulsory self-incrimination and in according collateral estoppel effect to his guilty plea. Petitioner also contends (Pet. 24-25) that the RICO action against him was "quasi-criminal," and that the district court's order granting summary judgment for the government and awarding injunctive relief violated his rights under the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. There is no merit to those claims.

1. In *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), this Court held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a *party to a civil cause.*'" *Id.* at 318 (quoting 8 J. Wigmore, *Evidence* 439 (McNaughton rev. 1961)). That holding disposes of petitioner's claim that his Fifth Amendment rights were violated by the district court's reliance on his refusal to answer incriminating questions in this case.

Petitioner asserts (Pet. 21-22) that *Baxter* is inapplicable in this case, because the Fifth Amendment is violated by permitting a court in a civil action brought by the government to draw an adverse inference from the defendant's silence in response to questioning by government officials. That claim, however, does not serve to distinguish *Baxter*, which involved questioning by government officials during prison disciplinary proceedings. This Court made clear in *Baxter* that the critical factor was not that the invocation of the right to silence occurred in

response to government questioning, but that the proceeding in which an adverse inference was drawn (in favor of the State) from the assertion of the right to silence was not a criminal proceeding. 425 U.S. at 316-320 (no violation of Fifth Amendment where government has not "sought to make evidentiary use of [inmate's] silence * * * in any criminal proceeding"); see *Austin* v. *United States*, 113 S. Ct. 2801, 2804 & n.4 (1993) (Self-Incrimination Clause of Fifth Amendment is "expressly limited to criminal cases"). Following *Baxter*, the courts of appeals have held that in civil actions brought by the government, courts may draw an adverse inference from a defendant's invocation of the Fifth Amendment privilege against compulsory self-incrimination in response to questioning by government officials. See, *e.g.*, *FDIC* v. *Elio*, 39 F.3d 1239, 1248 (1st Cir. 1994); *SEC* v. *Graystone Nash, Inc.*, 25 F.3d 187, 190-191 (3d Cir. 1994). Accordingly, the court of appeals in this case correctly held that the district court properly drew "an adverse inference from [petitioner's] failure to testify in this civil RICO proceeding, notwithstanding the fact that the [g]overnment, rather than a private party, is the plaintiff." Pet. App. 3a.[4]

2. Petitioner's claim (Pet. 22-23) that the district court erred in according collateral estoppel effect to his prior state conviction is equally unavailing. The full faith and credit statute, 28 U.S.C. 1738, "requires

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[4] Similarly, because this case involves only civil liability, petitioner's observation (Pet. 21) that the RICO statute uses "precisely the same language to create both criminal and civil liability" is irrelevant. Cf. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978).

federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged."[5] *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). Accordingly, "the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts." *Id.* at 466 n.6; see *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980).

Petitioner makes no argument that the courts of the State of New York would not accord collateral estoppel effect to his criminal conviction. He contends only that 18 U.S.C. 1964(d) limits the use of collateral estoppel in civil RICO actions to cases in which the United States has obtained a prior criminal conviction under the RICO statute. Petitioner's claim is based on a misreading of Section 1964(d). That provision merely states that a federal RICO conviction "shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States"; it does not limit the use of collateral estoppel in civil RICO actions to federal RICO convictions. Full faith and credit principles require federal courts to respect final state court judgments unless Congress "plainly state[s]" to the contrary. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. at 485. Nothing in the RICO statute or its legislative history suggests that Section 1964(d) was intended to create an exception to those principles.

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[5] Section 1738 provides that "judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State."

See *County of Cook* v. *Midcon Corp.*, 574 F. Supp. 902, 913 (N.D. Ill. 1983), aff'd, 773 F.2d 892 (7th Cir. 1985).

Petitioner also asserts (Pet. 23) that the "factors articulated by this Court" in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), weigh against according collateral estoppel effect to his prior criminal conviction, but he does not identify any factor mentioned in *Parklane Hosiery* that was not satisfied in this case. In particular, petitioner fails to show that the application of collateral estoppel was "unfair," as he suggests. As the court of appeals explained (Pet. App. 3a), petitioner "had a full and fair opportunity to litigate [the criminal charge] in state court, and is now precluded from relitigating the facts underlying his plea." Moreover, petitioner expressly acknowledged at the state court guilty plea proceeding that he understood that "the entry of this coercion plea * * * would act as a predicate felony offense for anything that may occur in the future." II C.A. App. A673.

3. Petitioner also contends (Pet. 24-25) that the remedies imposed by the district court subjected him to punishment that violated the Excessive Fines Clause of the Eighth Amendment. Contrary to petitioner's assertion, the Eighth Amendment has no application to the relief awarded by the district court. In *Austin* v. *United States*, *supra*, the Court explained that "[t]he purpose of the Eighth Amendment * * * was to limit the government's power to punish"; thus, the "Excessive Fines Clause limits the [g]overnment's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" 113 S. Ct. at 2805 (quoting *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)) (emphasis added by the Court).

In contrast to the *in rem* forfeiture at issue in *Austin*, which, the Court noted, has "historically * * * been understood, at least in part, as punishment," 113 S. Ct. at 2810, the civil sanctions available under 18 U.S.C. 1964(a) serve solely remedial purposes. By its terms, Section 1964(a) authorizes courts in civil RICO actions to order relief only to "prevent and restrain" violations of the RICO statute, not to punish past illegal conduct. See *United States* v. *Carson*, No. 94-6044 (2d Cir. Apr. 12, 1995), slip op. 3258 ("the jurisdictional powers in § 1964(a) serve the goal of foreclosing future violations, and do not afford broader redress"). Thus, the district court's order enjoining petitioner from engaging in activities involving waste disposal, committing further RICO violations, participating in the affairs of trade waste associations or labor unions, and associating with members of organized crime for commercial purposes was plainly aimed at preventing future violations of the RICO statute rather than punishing petitioner for past violations. This Court has also made clear that divestiture and disgorgement of proceeds of unlawful activity are nonpunitive remedies. As the Court explained in *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961), divestiture is "an equitable remedy designed to protect the public interest," and is therefore appropriate in civil proceedings, even though relief in those proceedings "must not be punitive." Similarly, a disgorgement order merely deprives a wrongdoer of the fruits of his illegal acts and is thus purely remedial. See *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399, 402 (1946); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994). In sum, because the sanctions imposed by the district court can " 'fairly be

said solely to serve a remedial purpose,'" *Austin*, 113 S. Ct. at 2806 (quoting *United States* v. *Halper*, 490 U.S. 435, 448 (1989)), they are not subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

For the same reasons, there is no basis for petitioner's claim (Pet. 25) that this civil RICO action was "quasi-criminal," and that therefore the entry of summary judgment violated his rights under the Due Process Clause.[6] The Court observed in *Austin* that "protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered criminal." 113 S. Ct. at 2805 n.4. In this case, as we have explained, the remedies imposed by the district court were nonpunitive. Accordingly, the district court's order granting summary judgment for the government in this civil action did not violate petitioner's due process rights.

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[6] Petitioner relies (Pet. 24-25) on Judge Heaney's dissent from the denial of his motion for a stay pending appeal. Judge Heaney acknowledged (Pet. App. 15a), however, that his view that the remedies imposed by the district court were punitive and that summary judgment therefore was inappropriate in this civil RICO action had "not been adopted by the courts of this circuit," and we are aware of no other court that has endorsed that position.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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